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ALEXANDER L. STEVAS,

Supreme Court of the United States

October Term, 1983

SIDNEY SILLER and SHIRLEY SILLER, his wife; IRVING GAINES and CORALIE J. GAINES, his wife; MARSHALL NATAPOFF and JANET NATAPOFF, his wife; FRANCIS CLARK and LUCILLE CLARK, his wife; and JOEL KRAMER, single,

Petitioners,

-and-

HARMON COVE CONDOMINIUM II ASSOCIATION, INC.,

Intervenor,

vs.

HARTZ MOUNTAIN ASSOCIATES, a corporation; HARMON COVE I CONDOMINIUM ASSOCIATION, INC., a corporation; and HARMON COVE RECREATION ASSOCIATION, INC., a corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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STATEMENT OF THE CASE

Respondent, Hartz Mountain Associates is the developer of certain residential condominiums located in Secaucus, New Jersey, known as Harmon Cove I and Harmon Cove II. Petitioners are five individual condominium owners in the Harmon Cove I development, which includes a total of 351 townhouse type units. The legal structure and organization of the development is in accordance with, and subject to, the New Jersey Condominium Act, N.J.S.A. 46:8B-1 *et seq.*

Respondent, Harmon Cove I Condominium Association is a non-profit corporation organized pursuant to Title Fifteen of the New Jersey Revised Statutes. Its membership is comprised of the 351 unit owners of Harmon Cove I, including the individual petitioners herein.

The By-laws of the Harmon Cove I Condominium Association grants membership automatically to each unit owner. The broad purposes of the Association are to administer and manage the condominium in accordance with its Certificate of Incorporation, By-laws and the Condominium Act.

The second stage of the development is managed by the Harmon Cove II Condominium Association, similarly organized.

In addition, in conjunction with the development of these condominiums, Hartz Mountain Associates caused to be created an additional non-profit corporation, known as Harmon Cove Recreation Association. Its membership is comprised of all of the unit owners of both Harmon Cove I and Harmon Cove II. Hartz Mountain Associates then conveyed to the Harmon Cove Recreation Association a fee simple interest in the recreation facilities and certain "community" facilities appurtenant to both developments. According to its Certificate of Incorporation its

function is to "... administer, manage, maintain, repair and operate ..." the facilities which *it owns* for the benefit of its membership.

Accordingly, the issues in this case had to be considered in light of the three distinct ownership interests created under the master condominium deed, the individual deeds, and the organizational structure of the condominium. First, the individual's fee ownership of his specific unit; second, the individual owner's undivided interest as a tenant-in-common in the so-called common elements of the development; and, finally, the ownership in fee by the Harmon Cove Recreation Association of certain recreational and communal facilities for the benefit of its members.

All of these relationships are clearly defined in the master deed, the offering plan and related disclosure documents, which are mandated to be furnished to all prospective purchasers of units. No allegation that such disclosures were less than adequate has been raised.

The respective Boards of Directors of the Harmon Cove I Condominium Association and the Harmon Cove Recreation Association, in discharge of their responsibilities, undertook to negotiate with the developer, Hartz Mountain Associates, to have certain construction deficiencies in the common areas and recreation and community facilities rectified or the cost thereof borne by the developer.

After lengthy negotiations, a proposed settlement was arrived at, the merits of which were not before the New Jersey Supreme Court. The settlement did call for the Associations to grant releases for all claims relating to such common facilities.

Prior to consummation of the proposed settlement, petitioners commenced this action in the Chancery Division of the Superior

Court of New Jersey seeking to enjoin the settlement, and seeking to obtain redress individually for the same matters which were the subject of the settlement. In addition, and highly significant, petitioners alleged that the same damage had been sustained by all unit owners, and that these petitioners should be certified as representing a class comprised of such unit owners.

The trial court granted respondents' motion to dismiss all claims against the developer, and recognized the Associations' authority to settle the matter on behalf of the unit owners, or standing to sue should such settlement abort.

The Appellate Division of the Superior Court of New Jersey affirmed.

Thereafter, the New Jersey Supreme Court affirmed. It found that the Associations had the exclusive right and standing to pursue relief for damages to the common elements by third parties.

Specifically, the court found, "Obviously, the unit owner has an interest in claims against the developer arising out of damages to or defects in the common elements. However, the Association has been charged with and delegated the primary responsibility to protect those interests . . . So long as it carries out those functions and duties, the unit owners may not pursue individual claims for damages to or defects in the common elements predicated upon their tenant-in-common interest." 93 N.J. at 370 (Pet. App. 11a).

The court, however, clearly reserved to the unit owners the right to seek relief for any injury to their individual unit, whether direct, or indirect as a result of defects in the common area. The court further left open causes of action in the nature of derivative suits to members of the Association should it fail to act on their behalf. Finally, the court reaffirmed the ever present right of the

membership to challenge the actions of its elected representatives should there be a breach of the fiduciary relationship.

REASONS FOR DENYING THE WRIT

I.

The petition presents no federal constitutional issue and no question of federal law for review.

Despite petitioners' labored selection of isolated phrases from its pleading and briefs, a fair reading thereof demonstrates that no question of federal constitutional law was presented to or argued in the New Jersey courts.

The closest that petitioners came to doing so, appears on the very last page of petitioners' brief in the New Jersey Superior Court (relied upon in the Supreme Court) that, "Any other rule would deprive condominium property owners of property rights without due process of law." (Pet. p. 8). This conclusory assertion was not preceded by any argument directed to the point, nor any citation supporting the same. All other references to a latent constitutional issue were effectively disguised, and surface for the first time in this petition for certiorari.

While this Honorable Court is not bound by the failure of the highest court of New Jersey to recognize or decide a constitutional issue, such issue must have been properly presented to the state court and in such manner that it was necessarily decided by that court. If not so presented then this Court will not consider it. *Street v. New York*, 394 U.S. 576 (1969).

In addition, where the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the

aggrieved party can affirmatively show the contrary. *Street v. New York*, *supra* at 582; *Bailey v. Anderson*, 326 U.S. 203 (1945).

Petitioners have not carried that burden.

It is noted in the petition that the Attorney General of the State of New Jersey was served with a copy of the petition for writ of certiorari herein, pursuant to Rule 28.4(c) and 28 U.S.C. §2403(b) (Pet. p. iii). No such service was accomplished on the Attorney General in the state court proceeding despite a rule of comparable import in New Jersey. N.J. Rule 2:5-1(h).

A reading of the opinion of the New Jersey Supreme Court clearly demonstrates that the case presented to and decided by it was exclusively concerned with an interpretation of New Jersey's comprehensive Condominium Act, N.J.S.A. 46:8B-1, and the functional structure of the various documents embodying petitioners' rights as unit owners in the condominium.

The decision focusing on such state law concepts as "standing to sue", "real party in interest", and substantive real estate law, reaches a commendable result which harmonizes and protects the individual unit owner's rights and the associations' rights, while promoting judicial efficiency consistent with prior state practice. *See Crescent Pk. Tenants Association v. Realty Eq. Corp.*, 58 N.J. 98 (1971). As such, it is submitted that no federal question has been presented for review or exists, and, accordingly, the writ prayed for should be denied.

II.

Petitioners have not been denied equal protection of laws.

It is difficult to conceive that the ruling of the New Jersey Supreme Court in this matter, granting the exclusive primary right

to a condominium association to enforce claims for damages to the common elements of a condominium, is a denial of equal protection to the individual unit owners.

A state may set the terms upon which it will permit litigants and litigations in its courts, and, provided the same has some rational basis, it will not be in violation of the Fourteenth Amendment equal protection dictate. *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949).

"Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so desperate, relative to the difference in classification, as to be wholly arbitrary." *Walters v. St. Louis*, 347 U.S. 231 (1953).

New Jersey has recognized that different ownership interests in property may form the basis for valid classification, and not violate the equal protection mandate. *Airwick Industries, Inc. v. Carlstadt Sewerage Auth.*, 57 N.J. 107 (1970); *Dome Realty, Inc. v. Paterson*, 83 N.J. 212 (1980).

Both the New Jersey legislature, in adoption of the Condominium Act, and the New Jersey courts have recognized that condominium form of ownership is inherently different than traditional fee ownership of real estate, and justifies desperate treatment. See *Papalexion v. Tower West Condominium*, 167 N.J. Super. 516 (Sup. Ct. Ch. Div. 1979), where the Court recognized that in condominium ownership, as in any group endeavor, a certain degree of individualism and individual rights must be subordinated to the common interest. Having selected the

condominium form of ownership, petitioners need recognize that they must relinquish a certain degree of freedom and independent action that they might otherwise enjoy with separate, privately owned property. *Hidden Harbour Estates v. Norman*, 309 So. 2d 180 (Fla. Dis. Ct. App. 1975).

It is respectfully submitted that condominium ownership is a valid class or category of real estate ownership, and supports the imposition of reasonable restrictions on the enforcement of rights shared in common with all other such owners. Accordingly, petitioners' equal protection argument must fail.

III.

The recognition of an exclusive right in the Condominium Association to sue for damages for injury to the common elements does not violate the constitutional prohibition of impairment of contracts.

Petitioners allege that the effect of the New Jersey Supreme Court decision is to violate the United States Constitution prohibition that, "No State shall . . . pass any . . . law impairing the Obligations of Contracts. . . ." U.S. Const. Act I, §10 Cl. 1. Petitioners misconstrue the nature of their contracts, and misapply the constitutional mandate.

Each prospective purchaser of a unit in the Harmon Cove I Condominium was furnished, in accordance with applicable law, a document entitled "Offering Plan for Harmon Cove I Condominium", dated October 24, 1975. Among other matters such Plan contained specimen copies of the purchase agreement they were later to execute, the unit deed, the master deed, the By-laws of the Condominium Association, the by-laws of the Recreation Association, as well as a detailed description of units and the common elements. The individual contracts provided that,

"The Unit is sold and is to be conveyed subject to the provisions of, and all matters set forth in or referred to by the Condominium Act, the Master Deed or a certain Offering Plan . . . all of which are incorporated herein by reference and made a part of this Agreement with the same force and effect as if set forth in full herein." Unit owners' deeds likewise incorporate the Condominium Act, and all declarations and restrictions contained in the master deed as well as the declaration in respect of certain community facilities. Finally, upon acceptance of membership in the Condominium Association and the Recreation Association, unit owners agree to be bound by the by-laws of those associations.

While the New Jersey Supreme Court recognized the unit owners' interest in the common elements, it found that the responsibility to protect those interests had been delegated by statute to the Association. See N.J.S.A. 46:8B-14, "the association . . . shall be responsible for the maintenance, repair, replacement, cleaning, and sanitation of the common elements"; N.J.S.A. 46:8B-18, "No unit owner shall contract for or perform any maintenance, repair, replacement, removal, alteration or modification of the common elements or any additions thereof, except through the association and its officers."

A fair reading of these restrictions supports the New Jersey court's conclusion that the Association has the primary responsibility to seek reimbursement for damages to the common elements from third parties, including the developer. Accordingly, the remedy which petitioners complain they are deprived of, is actually surrendered in their "contract". Their contract must be viewed as incorporating this statutory and organizational framework.

Having agreed to delegate the enforcement of violations of their interest in the common elements to their Association, they cannot complain that the court's recognition thereof is an

impairment of their contractual rights. Clearly not in a constitutional sense.

The federal constitutional prohibition embodied in Article 1 §10 is directed exclusively against state legislative action, and not court judgments. *Barrows v. Jackson*, 346 U.S. 249 (1953). And, while a statutory deprivation of a remedy to enforce contractual obligations might fall within the prohibition, reasonable conditions attached to the remedy fall short thereof. *Giffes v. Zimmerman*, 290 U.S. 326 (1933).

The New Jersey Supreme Court was careful to point out that petitioners, as unit owners, maintain individual rights to pursue damages to their units, including those sustained as a result of infirmities in the common elements. Equally significant they may, as is concurrently taking place in this action, challenge the performance of their elected Association representatives. Finally, should their representatives fail to act, they (the unit owners) may sue in the form of a derivative action.

In view of the consensual nature of the manner of dealing with the common elements embodied in the form of ownership chosen by the unit owners, and the entire scheme of remedies available to redress injury to the common elements, it is specious for petitioners to assert that the New Jersey legislature has unconstitutionally impaired a contractual obligation.

IV.

The New Jersey Supreme Court has not decided a federal question contrary to other state courts of last resort.

Petitioners allege that the writ should be granted under Rule 17.1(b) because the New Jersey Supreme Court has decided the same question as other state courts in a manner in conflict with

such courts. Petitioner frames this common issue as the "rights of unit owners to sue developer on contract for non-performance; breach of warranty, etc. as to residential units *and* as to common elements appurtenant thereto." (Pet. p. 19).

No single case relied upon by petitioners holds that failure to afford individual unit owners standing to sue would deprive them of any federal constitutionally protected right. Equally significant for purposes of this petition, no other state court facing this issue found a federal question worthy of addressing in its published opinion.

This line of cases relied upon by petitioners are principally represented by *Friendly Village Community Assoc., Inc. v. Silva & Hill Const. Co.*, 31 Cal. App. 3d 220, 107 Cal. Rptr. 123 (1973); *Ruberstien v. Burleigh House, Inc.*, 305 So. 2d 311 (Fla. Dist. Ct. App. 1974); *Deal v. 999 Lake Shore Ass'n*, 94 Nev. 301, 579 P. 2d 775 (1978). The holdings in these cases are more representative of a denial of the right to prosecute a claim by the condominium associations under then local law, than supportive of an unrestricted right to bring suit by individual unit owners. The trial court in the instant case aptly reflected that "The cases [from other jurisdictions] upon which plaintiffs rely arose under early condominium statutes which were silent as to the right of the association to sue on behalf of unit owners; finding no specific authority granted to the association, courts relied on strict local pleading rules to find that claims must be prosecuted by the real parties in interest, that is, the unit owners themselves." (Pet. App. 28a).

Where local legislation or standing rules have been found to permit an association to sue, suits by such associations on behalf of unit owners for damage to common elements have been sustained. In some cases these holdings overturned earlier holdings which pre-dated such legislation or court rule. See *Governor's*

Grove Condominium Ass'n. v. Hill Development Corp., 404 A. 2d 131 (Conn. Super. Ct. 1978); *1000 Grandview Ass'n. v. Mt. Washington Associates*, 434 A. 2d 796 (Pa. Super. Ct. 1981); *Wittington Condominium Inc. v. Braener Corp.*, 313 So. 2d 463 (Fla. Dist. Ct. of App. 1975). See also, Calif. Stats. 1976, Ch. 585, Section 2, expressly overruling the *Friendly Village* case, *supra*.

While courts in jurisdictions other than New Jersey (not necessarily courts of last resort) have reached a result contrary to the New Jersey Supreme Court herein, such result was not, and properly should not have been, predicated upon application of federal constitutional principles.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Association, Inc. and
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